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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIE B. WALTON,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

No. 49A04-0511-PC-629

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
The Honorable Amy Barbar, Magistrate
Cause No. 49G02-9306-CF-74770

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Willie B. Walton appeals the denial of his Petition for Post-Conviction Relief (PCR). We find the trial court properly found Walton's lack of remorse to be a proper aggravating factor, and that it may be used to enhance Walton's sentences and to order his sentences served consecutively. As a result, there is no fundamental error in the sentencing and Walton's counsel was not ineffective for failing to raise that issue on direct appeal. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 8, 1993, Walton strangled a 64-year-old man to death and stole his van. Walton was found guilty after a jury trial of murder, attempted robbery as a Class C felony, and auto theft as a Class D felony. He was sentenced to a total executed term of 61 years.

Walton appealed. Among the issues he raised on direct appeal were that the trial court erred in sentencing him because it failed to consider as mitigating circumstances that he had no criminal history, he was only 21 years old when the crime was committed, and he was strongly influenced by an accomplice. We affirmed in a memorandum decision, *Walton v. State*, 49A02-9501-CR-00017 (Ind. Ct. App. June 14, 1996).

Walton filed a PCR petition in which he alleged the trial court committed fundamental error by utilizing improper aggravating circumstances to support enhanced and consecutive sentences, and his appellate counsel was ineffective for failing to raise the improper aggravators on direct appeal. His PCR petition was denied.

DISCUSSION AND DECISION

At sentencing, the trial court stated:

The Court is well aware of the fact that it has aggravated this sentence. The Court feels that to impose a lesser sentence would depreciate the seriousness of this crime; that we feel that the defendant is in need of long-term confinement; that we feel that the defendant has not shown the proper amount of remorse for this vicious criminal behavior. For all those reasons we'd aggravate the sentence.

(Tr. at 897.) As the trial court apparently did not consider a sentence less than the presumptive, the aggravator that imposition of a lesser sentence would depreciate the seriousness of this crime was improper. *Pinkston v. State*, 836 N.E.2d 453, 464 (Ind. Ct. App. 2005), *trans. denied*. Nor did the trial court explain why Walton was in need of long-term confinement. As a result, that aggravator was also improper. *Ray v. State*, 838 N.E.2d 480, 494 (Ind. Ct. App. 2005), *trans. denied*.

The third aggravator was that Walton had not shown proper remorse. Even though Walton apologized to the victim's family at the sentencing hearing, it was within the trial court's discretion to determine whether the remorse he expressed was sincere. *See Penick v. State*, 659 N.E.2d 484, 489 (Ind. 1995) (a finding of remorse is within the sound discretion of the trial court). As our Indiana Supreme Court has determined a trial court may find a defendant's lack of remorse to be an aggravating factor, *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003), we find Walton's lack of remorse to be a valid aggravating circumstance.

At the time of Walton's sentencing a single aggravating circumstance could be used both to enhance a sentence and to impose consecutive sentences. *Payton v. State*,

818 N.E.2d 493, 498 (Ind. Ct. App. 2004), *trans. denied* 831 N.E.2d 738 (Ind. 2005); *Allen v. State*, 722 N.E.2d 1246, 1253 (Ind. Ct. App. 2000). Here, the trial court's finding as an aggravating factor that Walton lacked remorse was sufficient under Indiana law both to permit the enhancement of Walton's sentence and order those sentences be served consecutively.

As there was no error in Walton's sentencing, there was no fundamental error nor was his appellate counsel ineffective for failing to raise on direct appeal the issue of aggravating circumstances.

Affirmed.

BAKER, J., concurs.

SULLIVAN, J., dissents.